Supreme Court, U.S.
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CASE NO. 95-1295

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unicorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,
Petitioners,

v.

BETTY D. MONTGOMERY, Attorney General, State of Ohio; J. ANTHONY SAWYER, City Attorney of the City of Dallas, Ohio; LEE FALKE, Prosecuting Attorney, Montgomery County, Ohio,
Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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**In accordance with Rule 35, Betty D. Montgomery is the current Attorney General and should be substituted as the named Respondent as successor to former Attorney General Lee Fisher.*

16 p/p

PARTIES TO THE PROCEEDING

Betty D. Montgomery is the current Attorney General of Ohio, and should be substituted as the named Respondent in this proceeding as the successor in interest to former Attorney General Lee Fisher.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a State Legislature May Impose Greater Registration Requirements on New Professional Fundraisers Than Established Professional Fundraisers under the Free Speech Clause.

2. Whether a State Legislature May Exempt Religious Organizations from the Registration Requirements of its Charitable Solicitation Laws under the Establishment, Equal Protection and Free Speech Clauses.

3. Whether a State Legislature May Impose Point-of-Solicitation Regulations (E.g., Name, Status, Charities Involved, and If Requested, Percentage of Contributions Given to Charities) for Charitable Organizations and Professional Fundraisers under the Free Speech Clause.

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REASONS FOR DENYING THE WRIT

I. THERE IS NO LOWER-COURT SPLIT OF AUTHORITY ON THE ISSUES PRESENTED, AND THIS INTERLOCUTORY APPEAL RAISES QUESTIONS THAT THE COURT HAS ADDRESSED MANY TIMES BEFORE.

At the outset, there are several prudential reasons for denying the writ. To start with, the petition fails to raise a single issue that has divided the lower federal courts or the state courts. There simply is no split of authority on the questions presented. Under these circumstances, this simply is not a case warranting the exercise of the Court's discretionary jurisdiction. *See* Sup. Ct. R. 10.

Not only do petitioners fail to identify any lower-court conflicts demanding prompt resolution, but they also are bringing an interlocutory appeal. True, 28 U.S.C. § 1292(a)(1) permits interlocutory appeals of injunction decisions. True also, it permits limited interlocutory appeals from those decisions that are of serious and perhaps irreparable consequence. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981). But, even if this standard permitted immediate appeal of the decision below, the Court has long shown a preference for exercising its limited discretionary jurisdiction in the context of complete records developed in full hearings concluded by a final judgment. That preference is particularly appropriate in the context of preliminary injunction decisions like this one, where the legal issues are viewed through the prism of likelihood of success on the merits. *See* Petition, App. 18, 23.

Nor are the issues raised in this case ones in which

the Court has failed to give the lower courts guidance. The Court's trilogy of recent decisions, *see Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), has given state legislatures, state courts and federal courts abundant direction in this area. Having recently provided significant clarity to this area of the law, there is no pressing reason to review the issues in this case at this time.

II. THE LOWER COURTS CORRECTLY HELD THAT OHIO'S CHARITABLE SOLICITATION LAW DOES NOT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.

A. Overview of the Statute's Constitutionality.

In addition to these prudential considerations, there is another equally prominent reason for denying the writ: The Sixth Circuit (*Doughtrey*, Engel, Norris) correctly affirmed the district court's (Rice) decision. In part because the lower courts were not writing on a clean slate in this area, they had little difficulty rejecting Petitioners' challenge to the statute.

No doubt charitable solicitations are protected by the free speech guarantees of the First and Fourteenth Amendments. But, as this Court has recognized, they still are "subject to reasonable regulation narrowly tailored to serve legitimate and substantial governmental interests." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). More to the point, the Court has acknowledged that state concerns in this area may be

"accommodated directly, through disclosure, registration requirements and penalties for fraudulent conduct," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.16 (1984), and "the interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation," *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792 (1988). Accordingly, while regulations must be narrowly tailored to advance the State's asserted interest, mandatory disclosure requirements satisfy this test. *See, e.g., id.* at 799 n.11. *See also Village of Schaumburg*, 444 U.S. at 637-38 ("[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed").

Contrary to Petitioners' suggestions (Petition, at 10-13), the Ohio Charitable Solicitation Act is fully consistent with these requirements. At its core, the Act is merely a registration and disclosure law. It ensures that Ohio residents have adequate information to make decisions about charitable giving. Under the Act, charitable organizations and professional solicitors are required to file a registration statement with the Attorney General. O.R.C. §§ 1716.02 and 1716.07. Upon filing the necessary documentation, the charitable solicitor is free to solicit contributions. The statute does not require licensure or any type of permit. Nor is any waiting period imposed before a solicitation may commence. And, if for any reason the Attorney General wishes to prevent a solicitation from occurring, she must seek judicial intervention before doing so. *See* O.R.C. § 1716.16.

The Act also requires charitable organizations to file annual financial reports, and professional solicitors to file financial reports within ninety days of the close of a

particular solicitation. O.R.C. §§ 1716.04, 1716.07(E). These reports provide the public with the kind of information that is needed to make informed decisions about giving. They also provide the Attorney General with information necessary to enforce the law and to detect instances of possible wrongdoing. Notably, the Act requires charitable organizations to provide *less* information to the Attorney General than the Internal Revenue Service requires when it determines if charitable organizations are in fact fulfilling the charitable purposes for which they were organized. In the end, these modest registration requirements fall well within the ambit of permissible regulations of charitable solicitations. *See, e.g., Riley*, 487 U.S. at 788, 795; *Munson*, 467 U.S. at 967-68 & n.16; *Village of Schaumburg*, 444 U.S. at 637-38 & n.12; *Larson v. Valente*, 456 U.S. 228, 240 (1982); *Buckley v. Valeo*, 424 U.S. 1, 60-68 (1976); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). The Sixth Circuit was correct in so holding.

B. The Act Does Not Unlawfully Discriminate Against Small and Unpopular Charities.

In addition to their broad-based challenge to the Act, Petitioners also make several specific attacks. They initially argue (Petition, at 13-19) that the registration requirements unconstitutionally discriminate against small and unpopular charities and in favor of large, well-established charities, and contend that this alleged discrimination warrants strict scrutiny. They are wrong in several respects.

As an initial matter, the statute does not single out small charities for differential treatment. As the Sixth Circuit properly recognized, the smallest organizations -- those who raise less than $25,000 -- are not covered by the

registration and fee provisions of the Act. *See* Petition, at App. 13; O.R.C. § 1716.03(E). While the Act may distinguish between new and established charities in its registration requirements, it simply does not distinguish between small and large charities.

Next, strict scrutiny is not appropriate for such a claim. When a legislative classification does not impinge upon a fundamental right or create a suspect class, it need only be rationally related to a legitimate governmental purpose to satisfy equal protection. *See Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). Here, the statute's informational and anti-fraud aims plainly meet this test. Nor did Petitioners ever establish that the Act "interfered with the fundamental right to free speech." Petition, at App. 13. The exemption is content-neutral because it applies without regard to the content of the solicitations undertaken.

In the alternative, even if strict scrutiny were applied to these classifications, the Act withstands this higher level of review. *Id.* at App. 13-14. The principal classification -- between new and established charities -- is narrowly drawn to meet the compelling interest in preventing fraudulent solicitation. The challenged registration and fee requirements generally are limited in duration (two years). Plus, during this two-year period, while a legitimate track record is established the modest registration requirements help ensure that citizens are protected from fraudulent schemes. Notably, registration and reporting have been found to be among the least intrusive means of regulating protected speech. *See, e.g.*, *Riley*, 487 U.S. at 788, 795; *Munson*, 467 U.S. at 961-62; *Village of Schaumburg*, 444 U.S. at 637-38 & n.12; *Buckley*, at 60-64.

C. The Exemption for Religious Organizations Does Not Violate The Establishment, Freedom of Speech, Or Equal Protection Clauses.

Petitioners next assert (Petition, at 19-24) that the Act's exemption for "religious organizations" creates an improper establishment of religion and violates free speech and equal protection rights. The District Court, however, correctly rejected these claims. And so did the Sixth Circuit.

In *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), this Court rejected a similar claim. Under attack in *Amos* was an exemption for religious organizations from Title VII's general prohibition against religious discrimination. In rejecting the claim, the Court held that the test articulated under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be used in assessing the validity of such exemptions.

The same approach governs this case. The Ohio statute (1) achieves "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *Amos*, 483 U.S. at 335; (2) does not have the effect that "the *government itself* has advanced religion through its own activities and influence," *id.* at 337 (emphasis in original); and (3) avoids impermissible entanglement between church and state because it "effectuates a more complete separation of the two and avoids [any] intrusive inquiry into religious belief," *id.* at 339.

The lower courts also recognized that Petitioners' reliance on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), is

misplaced. There are two reasons. Unlike *Texas Monthly*, the legislation here also exempts some secular organizations from the registration requirements. And unlike *Texas Monthly*, this legislation does not contain a state subsidy for religious belief. The Establishment Clause simply is not violated when a statutory exemption applies to secular and religious organizations alike. *See Waltz v. Tax Comm'n*, 397 U.S. 664 (1970); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 15-18 (1988) (rejecting equal protection attack on exemption for religious and benevolent organizations from private club ordinance); *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (religious exemption is not constitutionally prohibited); *Wickman v. Firestone*, 500 So. 2d 740, 741 (Fla. App. 1987) (upholding exemption applicable to religious organizations under Florida's charitable solicitation law).

Amos also held that when a statute meets the *Lemon* test, "we see no justification for applying strict scrutiny" with respect to equal protection claims. 483 U.S. at 339. Plainly, the exemption meets the rational-basis test, if for no other reason than that it alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* Finally, the exemption does not violate freedom of speech. The exemption serves purposes wholly unrelated to the content of the organization's speech.

D. The Point-of-Solicitation Requirements Do Not Violate Free Speech Rights.

Petitioners lastly argue (Petition, at 24-27) that the Sixth Circuit erred in upholding the Act's point-of-solicitation requirements against a free speech attack. They are

mistaken.

As an initial matter, it is important to clarify the modest nature of the Act's disclosure requirements. Prior to requesting a solicitation verbally, professional solicitors need only disclose their name, their status as a professional fundraiser, and the name and address of the charity for whom they are seeking contributions. Also, if asked by a potential donor but not otherwise, the solicitor is required to disclose the percentage of gross revenue that the charity will actually receive from the solicitation campaign. *See* O.R.C. § 1716.08(B).

Riley, to be sure, invalidated an across-the-board requirement that fundraisers in all cases disclose the percentage of charitable funds actually given by them to charity. 487 U.S. at 795-98. But, in doing so, the Court specifically approved more modest disclosure requirements like those presented here.

> The Act, as written, requires the fundraiser to disclose his or her employer's name and address. Arguably, this may not clearly convey to the donor that the solicitor is employed by a for-profit organization, for example, where the employer's name is "Charitable Fundraisers of America." However, nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

Id. at 799 n.11. The Court also noted approvingly that

under a related statute not challenged in the case, fundraisers must disclose, upon request, "how much of the contribution will be turned over to the charity." *Id.* at 799. Neither the Sixth Circuit nor the district court erred in following *Riley*'s clear guidance on this point.

Petitioners also argue (Petition, at 26-27) that it is impermissible to require organizations that are not themselves tax-exempt under federal law (i.e., non-501(3)(c) organizations) to disclose the uses to which they will put any charitable contributions received. But since a charitable appeal is being used to obtain such contributions, informing the potential donor of the purposes for the donation is necessary and proper, and indeed is narrowly tailored to serve the State's legitimate interests of informing the public and preventing the misuse of charitable contributions.

CONCLUSION

Respondent respectfully asks the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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